Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors

HIGH COURT (JOHOR BAHRU) — APPLICATION FOR JUDICIAL REVIEW NO 25–28–05 OF 2013
MOHD NAZLAN JC
29 OCTOBER 2015

Civil Procedure — Judgments and orders — Mandamus — Non-adherence of consent order — Application for judicial review for order of mandamus to compel proposed contemnors to comply with certificate of judgment and consent order — Whether contempt established — Government Proceedings Act 1956 s 33(1)

The applicant had instituted a civil suit action against the Menteri Besar Johor ('the first proposed contemnor'), Pengarah Tanah dan Galian Negeri Johor ('the second proposed contemnor') and Unit Perancang Ekonomi Negeri Johor ('the third proposed contemnor') collectively known as 'the proposed contemnors'. Whilst the trial of the civil suit was in progress, the applicant and proposed contemnors entered into negotiations with a view to settling the civil suit. A settlement was reached between the parties and recorded in the High Court by way of a consent order ('the first consent order'). However, the proposed contemnors failed to comply with the first consent order. The applicant applied for a certificate of judgment under s 33(1) of the Government Proceedings Act 1956 ('the s 33(1) application'). The proposed contemnors consented to the s 33(1) application and 'certificate of judgment' was issued ('the second consent order'). The s 33(1) application was heard and a sum of RM26m was ordered to be paid for the removal of the applicant's caveat over two acres of land which formed the subject matter of the first consent order ('the said caveat') ('the 6 February 2013 order'). The applicant had earlier lodged the caveat subsequent to the first consent order being recorded. The certificate of judgment and the second consent order as well as the 6 February 2013 order were served on the Johor State Legal Advisor's Office ('the SLA'). The said caveat was removed and the sum of RM26m paid to the applicant by the third party on or about 14 February 2013. The non-observance of the first consent order, the certificate of judgment and the second consent order persisted notwithstanding the court's sanctioned agreements amongst the parties. Dissatisfied with the continued non-adherence on the part of the proposed contemnors to the first consent order, the certificate of judgment and the second consent order, the applicant filed an application for judicial review seeking, inter alia, an order of mandamus to compel the proposed contemnors to comply with the certificate of judgment and the second consent order. Leave having been granted to commence judicial review proceedings against the proposed contemnors, the

substantive judicial review proceedings, contested by the proposed contemnors, concluded where the High Court allowed the application and granted the mandamus order against the proposed contemnors. The mandamus order was a final order. The proposed contemnors did not appeal to the Court of Appeal against the mandamus order which was served on the SLA. The applicant informed the first proposed contemnor seeking compliance with the mandamus order. The said letter was copied to the second and third proposed contemnors. Despite the applicant and the proposed contemnors having communicated on the mandamus order in the period since the service of the mandamus order on the SLA, to date, the proposed contemnors have however yet to comply with the mandamus order.

Held:

(1) Given the nature of the leave application which was on the basis of ex parte, the applicant would only need to establish a prima facie case of contempt on a balance of probabilities, focusing on the evaluation of the O 52 of the Rules of Court 2012 ('the ROC') statement. Matters concerning other procedural safeguards, which were not strictly related to the grounds of application within the ambit of O 52 r 3, if however raised and considered at the leave stage would similarly be subject to the same prima facie test. The very essence of the insistence on the adherence to sufficient particularity of O 52 statement was so that a proposed contemnor was fully aware of the case of contempt instituted against him. This was the rationale for the grounds of the application to be clearly described in the O 52 statement, and to be verified by the accompanying affidavit in support, as clearly stipulated under O 52 r 3(2) of the ROC (see paras 29 & 34).

(2) The requirement of sufficient particularity had clearly been satisfied by the terms of the disclosure contained therein. There was no justifiable basis to suggest that the proposed contemnors have not been given, let alone apprised of the true and full grounds on the case of committal against the proposed contemnors. As made manifest in the O 52 statement and referred to earlier in this judgment, the fact, nature and essence of the obligations of the proposed contemnors, which originally came about from the civil suit and throughout the period that ensued until presently, thus countering any possible argument on the lack of knowledge of the basis of the charge of contempt. These obligations, based on the O 52 statement, have been nothing more than what appeared to be empty promises, repeatedly made but remained continually unfulfilled (see para 36).

(3) The court failed to see how this case could assist the contention of the proposed contemnors. It pertained an action in defamation, not an order for committal. It had no relevance to O 73 r 12. There was no discernible

basis to suggest that the case supports the argument that no committal proceedings could lie against the Menteri Besar because he acted on behalf of the state government. That case merely stated that the Menteri Besar was no different from the state government he acted on behalf of purely because in the context of defamation law which is personal in nature, the state government had no capacity to maintain the same. Thus, in performing his official function the Menteri Besar was also ruled not to have such capacity (see para 47).

(4) The landscape of constitutional and administrative laws in this country had sufficiently evolved and attained the sophistication and maturity deemed integral to the well functioning of a democratic and civil society that the answer to the question was decidedly in the affirmative. A minister can in law be found guilty of contempt in his official capacity (see para 55).

(5) The proposed contemnors submitted that the applicant had also failed to adhere to the terms of the first consent order which stipulated that the applicant 'may apply to the state authority within two years from the date of this order'. This contention by the proposed contemnors should more appropriately be dealt with at the substantive committal stage (should leave be granted) because it involves factual disputes that ought rightfully be dealt with by the filing of affidavit in opposition by the proposed contemnors. The submission put forward by the SLA, other than those raising points of law, would otherwise tantamount to mere statements from the Bar, and thus could not be admitted (see paras 71–72).

(6) The applicant have successfully established a prima facie case of contempt of court against the proposed contemnors for the latters' failure to comply with the terms of mandamus order, justifying leave be granted to the applicant to make an application to the court for an order of committal against the proposed contemnors. The contents of the verifying affidavit cannot by any stretch of imagination be construed and being inherently improbable, especially given that the non-adherence appeared to have set in since the first consent order and persisted for a continued period of about five years, disobeying the certificate of judgment and the second consent order in the process and the mandamus order as presently (see para 74).

[Bahasa Malaysia summary

Pemohon telah memulakan tindakan sivil terhadap Menteri Besar Johor ('penghina pertama yang dicadangkan'), Pengarah Tanah dan Galian Negeri Johor ('penghina kedua yang dicadangkan') dan Unit Perancang Ekonomi Negeri Johor ('penghina ketiga yang dicadangkan') secara kolektif dikenali sebagai 'penghina-penghina yang dicadangkan'. Sementara perbicaraan tindakan sivil sedang berlangsung, pemohon dan penghina-penghina yang

dicadangkan memasuki perundingan dengan pandangan untuk menyelesaikan tindakan sivil tersebut. Penyelesaian dicapai di antara pihak-pihak dan direkodkan di Mahkamah Tinggi melalui perintah izin ('perintah izin pertama'). Walau bagaimanapun, penghina-penghina yang dicadangkan gagal untuk mematuhi peintah izin pertama. Pemohon memohon untuk sijil penghakiman di bawah s 33(1) Akta Prosiding Kerajaan 1956 ('permohonan s 33(1) tersebut'). Penghina-penghina yang dicadangkan bersetuju kepada permohonan s 33(1) tersebut dan 'certificate of judgment' dikeluarkan ('perintah izin kedua'). Permohonan s 33(1) didengar dan sejumlah RM26 juta diperintahkan dibayar untuk pemotongan kaveat pemohon ke atas dua ekar tanah yang membentuk perkara perintah izin pertama tersebut ('kaveat') ('perintah 6 Februari 2013 tersebut'). Pemohon telah sebelumnya memasukkan kaveat berikutan perintah izin pertama yang direkodkan. Sijil penghakiman dan perintah izin kedua dan juga perintah 6 Februari 2013 diserahkan ke atas Pejabat Penasihat Undang-Undang Negeri Johor ('PUN'). Kaveat tersebut dipotong dan sejumlah RM26 juta dibayar kepada pemohon oleh pihak ketiga pada atau kira-kira 14 Februari 2013. Kegagalan untuk mematuhi perintah izin pertama, sijil penghakiman dan perintah izin kedua berterusan meskipun perjanjian-perjanjian yang disaksikan mahkamah di antara pihak-pihak. Tidak berpuas hati dengan ketidakpatuhan yang berterusan oleh pihak penghina-penghina yang dicadangkan kepada perintah izin pertama, sijil penghakiman dan perintah izin kedua, pemohon memfailkan permohonan untuk semakan kehakiman memohon, antara lain, perintah mandamus untuk memaksa penghina-penghina yang dicadangkan mematuhi sijil penghakiman dan perintah izin kedua. Setelah izin diberikan untuk memulakan prosiding semakan kehakiman terhadap penghina-penghina yang dicadangkan, prosiding semakan kehakiman substantif, ditentang oleh penghina-penghina yang dicadangkan, diputuskan di mana Mahkamah Tinggi membenarkan permohonan tersebut dan memberikan perintah mandamus terhadap penghina-penghina yang dicadangkan. Perintah mandamus adalah perintah terakhir. Penghina-penghina yang dicadangkan tidak merayu kepada Mahkamah Rayuan terhadap perintah mandamus yang mana diserahkan ke atas PUN. Pemohon memberitahu penghina pertama yang dicadangkan memohon pematuhan dengan perintah mandamus tersebut. Surat tersebut disalinkan kepada penghina kedua dan ketiga yang dicadangkan. Meskipun pemohon dan penghina-penghina yang dicadangkan berkomunikasi mengenai perintah mandamus semenjak tempoh penyerahan perintah mandamus ke atas PUN, sehingga kini, penghina-penghina yang dicadangkan walau bagaimanapun tidak mematuhi perintah mandamus tersebut.

Diputuskan:

(1) Melihat kepada sifat permohonan izin yang mana adalah atas dasar ex parte, pemohon hanya perlu untuk membuktikan kes prima facie

penghinaan atas imbangan kebarangkalian, memfokus ke atas penilaian pernyataan A 52 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Perkara-perkara berkaitan pelindung prosedur yang lain, yang mana tidak secara ketat berkaitan kepada alasan permohonan dalam lingkungan A 52 k 3, jika walau bagaimanapun dibangkitkan dan dipertimbangkan pada peringkat izin begitu juga akan tertakluk kepada ujian prima facie yang sama. Inti pati sesungguhnya desakan ke atas pematuhan kepada ketelitian mencukupi pernyataan A 52 adalah dengan itu penghina yang dicadangkan menyedari sepenuhnya kes penghinaan yang dimulakan terhadapnya. Ini adalah rasional untuk alasan-alasan permohonan dinyatakan dengan jelas di dalam pernyataan A 52, dan disahkan dengan afidavit sokongan yang disertakan, seperti yang jelas ditentukan di bawah A 52 k 3(2) KKM (lihat perenggan 29 & 34).

(2) Kehendak ketelitian mencukupi jelas dipenuhi oleh terma-terma pendedahan yang terdapat di dalamnya. Tidak terdapat asas justifikasi untuk mencadangkan bahawa penghina-penghina yang dicadangkan telah tidak diberikan, apatah lagi dimaklumkan mengenai alasan-alasan sebenar dan penuh atas kes komital terhadap penghina-penghina yang dicadangkan. Seperti jelas dinyatakan dalam pernyataan A 52 dan dirujuk sebelumnya dalam penghakiman ini, fakta, sifat dan inti pati kewajipan penghina-penghina yang dicadangkan, yang pada asalnya daripada tindakan sivil dan sepanjang tempoh berbangkit sehingga kini, oleh itu menentang apa-apa hujah kemungkinan atas kekurangan pengetahuan mengenai dasar tuduhan penghinaan. Kewajipan ini, berdasarkan atas pernyataan A 52, tidak lebih daripada apa dilihat sebagai janji kosong, dibuat berulang kali tetapi kekal berterusan tidak dipenuhi (lihat perenggan 36).

(3) Mahkamah gagal untuk melihat bagaimana kes ini boleh membantu penghujahan penghina-penghina yang dicadangkan. Ia berkenaan tindakan fitnah, bukan perintah untuk komital. Ia tidak relevan kepada A 73 k 12. Tidak terdapat dasar yang ditanggap untuk mencadangkan bahawa kes menyokong penghujahan bahawa tiada prosiding komital boleh dikenakan terhadap Menteri Besar kerana beliau bertindak bagi pihak kerajaan negeri. Kes tersebut hanya menyatakan bahawa Menteri Besar tidak berbeza daripada kerajaan negeri, beliau bertindak bagi pihak semata-mata kerana dalam konteks undang-undang fitnah yang mana adalah bersifat peribadi, kerajaan negeri tidak mempunyai kapasiti untuk mengekalkannya. Oleh itu, dalam menjalankan fungsi rasminya Menteri Besar juga diputuskan tidak mempunyai kapasiti sedemikian (lihat perenggan 47).

(4) Latar belakang undang-undang perlembagaan dan pentadbiran di negara ini telah cukup berkembang dan mencapai kecanggihan dan kematangan dianggap penting kepada kefungsian baik masyarakat demokratik dan

sivil bahawa jawapan kepada soalan diputuskan dalam alternatif. Seorang menteri boleh dari segi undang-undang didapati bersalah menghina dalam kapasiti rasminya (lihat perenggan 55).

(5) Penghina-penghina yang dicadangkan berhujah bahawa pemohon juga gagal untuk mematuhi kepada terma-terma perintah izin pertama yang menetapkan bahawa pemohon 'may apply to the state authority within two years from the date of this order'. Hujahan ini oleh penghina-penghina yang dicadangkan patut lebih wajar diuruskan pada peringkat komital substantif (sekiranya izin diberikan) kerana ia melibatkan pertikaian fakta yang patut secara betul diuruskan dengan memfailkan afidavit bertentangan oleh penghina-penghina yang dicadangkan. Penghujahan yang dikemukakan oleh PUN, selain daripada yang membangkitkan fakta undang-undang, akan sebaliknya serupa kepada pernyataan semata-mata daripada Majlis Peguam, dan oleh itu tidak dapat dimasukkan (lihat perenggan 71–72).

(6) Pemohon telah berjaya membuktikan kes prima facie penghinaan mahkamah terhadap penghina-penghina yang dicadangkan kerana kegagalan mereka untuk mematuhi terma-terma perintah mandamus, menjustifikasikan izin diberikan kepada pemohon untuk membuat permohonan kepada mahkamah bagi perintah komital terhadap penghina-penghina yang dicadangkan. Isi kandungan afidavit pengesahan tidak boleh ditafsirkan dan tidak boleh dipercayai secara inherens, terutamanya mengambil kira ketidakpatuhan telah berlaku semenjak perintah izin pertama dan berterusan untuk tempoh lanjut lebih kurang lima tahun, mengingkari sijil penghakiman dan perintah izin kedua dalam proses dan perintah mandamus pada masa ini (lihat perenggan 74).]

Notes

For cases on judgments and orders in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5149–5530.

Cases referred to

Allport Alfred James v Wong Soon Lan [1989] 1 MLJ 338, HC (refd)
Ang Boon Chye and another v Ang Tin Yong [2011] SGHC 124, HC (refd)
Ang Tin Yong v Ang Boon Chye and another [2011] SGCA 60, CA (refd)
Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193, SC (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240, HC (refd)
Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor [1997] 5 MLJ 209, HC (refd)
Dato' Oon Ah Baa @ Boon Pak Leong & Others v Eagle & Pagoda Brand Teck Aun Medical Factory & Others [2003] MLJU 291; [2003] 7 CLJ 81, HC (refd)
Entick v Carrington [1765] EWHC KB J98 (refd)

A *Foo Khoon Long v Foo Khoon Wong* [2009] 9 MLJ 441, HC (refd)
Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (refd)
Harmsworth v Harmsworth [1987] 3 All ER 816, CA (refd)
B *Dr Q v The Health Committee of the Medical Council of Hong Kong* [2014] 2 HKLRD 57 (refd)
Kerajaan Negeri Trengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2) [2013] 7 MLJ 145; [2013] 1 CLJ 124, HC (refd)
Lembah Mayang Sdn Bhd & Others v Pengarah Jabatan Perhutanan &
C *Anor* [2004] MLJU 201; [2004] 6 CLJ 465, HC (refd)
Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Anor [2004] 4 MLJ 384; [2003] 1 AMR 206, CA (refd)
M, In re [1994] 1 AC 377, HL (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ
D 641; [2008] 5 CLJ 321, FC (refd)
Madlis Azid @ Aziz & Ors v Chua Yung Kim & 3 Ors [2012] 5 AMR 344, HC (refd)
Majlis Perbandaran Melaka Bandaraya Bersejarah v Yau Jiok Hua [2006] 5 MLJ 389, HC (refd)
E *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241; [2002] 4 CLJ 401, FC (refd)
Nicholls v Nicholls [1997] 147 NLJR 61 (refd)
PP v Datuk Hj Harun bin Hj Idris (No 2) [1977] 1 MLJ 15 (refd)
Plastech Industrial Systems Sdn Bhd v N & C Resources Sdn Bhd & Ors [2013] 10
F MLJ 837, HC (refd)
Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal [1994] 2 MLJ 601; [1994] 2 CLJ 705, SC (refd)
Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58, FC (refd)
G *Bramblevale Ltd, In re* [1970] 1 Ch 128, CA (refd)
R (on application of Lamari) v Secretary of State for Home Department [?2012] EWHC 1630 (Admin), HC (refd)
Ronald Philip Devereux & Anor v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors [2012] 4 MLJ 665, HC (refd)
H *Sabil Mulia (M) Sdn Bhd v Director of Tengku Ampuan Rahimah Hospital* [2005] 3 MLJ 325; [2005] 2 AMR 502, CA (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151, FC (refd)
Tan Kang Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors [2015] 4 CLJ 113,
I HC (refd)
Tan Sri Dato (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)
Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541; [2013] 1 CLJ 1060, CA (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)
Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors [2009] 3 MLJ 191, CA (refd)
Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699; [2000] 3 CLJ 666, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Crown Proceedings Act 1947 [UK]
Federal Constitution arts 8, 11, 126, Eight Schedule , cl 1(1)
Government Proceedings Act 1956 ss 2(2), 33(1), (3), (4)
Laws of the Constitution of Johor arts 3, 4, 7
National Land Code ss 5, 12(1), 16(2), 76
Rules of Court 2012 O 1 r 4, O 42 r 6, O 45, O 45 rr 5, 7, 7(7), O 46, O 47, O 48, O 49, O 50, O 51, O 52, O 52 rr 3, 3(2), 4(2), O 73, O 73 rr 1, 12, 12(1), (2)
Rules of Supreme Court 1965 [UK] O 52
Rules of the High Court 1980
Rules of Court 1996 [SG] O 52 r 2
Specific Relief Act 1950

Malik Imtiaz Sarwar (Robert Lai Poh Fye, Fadzilah bt Mansor and Pavendeep Singh with him) (Jackson & Masacorale) for the applicant.
Nurul Izalina bt Rajaai (Nur Farhanah bt Ishak with her) (State Legal Advisor Office Nusajaya, Johor) for the respondents.

Mohd Nazlan JC:

INTRODUCTION

[1] This case concerns an application under O 52 r 3 of the Rules of Court 2012 for leave to commence committal proceedings against the three respondents. It discusses the law on the principles governing the request for leave and the important point of law on the applicability of enforcement process by way of committal to ministers, including Menteri Besar of state governments.

KEY BACKGROUND FACTS

[2] It is crucial that the specific prayers set out in the ex parte notice of application ('encl 17') (the translated version) be reproduced, as follows:

1. That each of the following (together, the 'Proposed Contemnors'):

   (a) Menteri Besar Johor ('First Proposed Contemnor');

(b) Pengarah Tanah & Galian Negeri Johor ('Second Proposed Contemnor'); and/or

(c) Unit Perancang Ekonomi Negeri Johor ('Third Proposed Contemnor') be committed to prison and/or fined such amounts as may be deemed appropriate by this Honourable Court for the Proposed Contemnors' contempt of this Honourable Court in disobeying the order of this Honourable Court dated 06.02.2014 granted in the underlying proceedings and/or interfering with the administration of justice in failing to comply with the said order;

2. That the Proposed Contemnors, jointly and severally, do pay the Applicant on a full indemnity basis all costs of, arising from or otherwise occasioned by these proceedings;

3. Any further and/or other order this Honourable Court deems fit and/or otherwise appropriate.

And that the Statement pursuant to Order 52 r 3 of the Rules of Court 2012 dated 27.5.2015 and the Affidavit-in-Support of Mohadi bin Sardi dated 27.5.2015 in support of this Application be read in support of the grounds on which this application for leave to apply for an order for committal is being sought.

[3] The order of 6 February 2014 stated to have been disobeyed by the proposed contemnors is in respect of the judicial review remedy of mandamus. Based on the matters specified in the requisite statement pursuant to O 52 r 3 of the Rules of Court 2012 dated 27 May 2015 ('the O 52 statement') and the affidavit in support, the legal dispute amongst the parties began about a decade ago, in respect of which, for greater clarity I set out hereunder the earlier relevant court proceedings in summarised fashion especially given that they were mentioned in the terms of the order of mandamus said to have been transgressed.

THE CIVIL SUIT

[4] The applicant had vide Johor Bahru High Court Civil Suit No 22–290 of 2005 instituted an action against the proposed contemnors for, amongst others, the following reliefs (the 'civil suit'):

(a) that the defendants ('the proposed contemnors') do deliver to DPMM Negeri Johor ('the applicant') land containing an area of 65,377 acres comprised in Lot PTB 20114 situated at Pantai Lido, Johor Bahru, Johor;

(b) alternatively, profits amounting to RM475m (less RM153m payable to the third defendant ('the third proposed contemnor') in 15 years) or a net sum of RM322m; and

(c) the amount actually expended by the plaintiff ('the applicant') in the sum of RM631,303.

[5] Whilst the trial of the civil suit was in progress, at the initiative of the proposed contemnors, the applicant and proposed contemnors entered into negotiations with a view to settling the civil suit.

The first consent order

[6] A settlement was reached between the parties and recorded in the High Court by way of a consent order dated 14 December 2009 ('the first consent order'). The exact terms of the first consent order are reproduced as follows:

1. The Defendants shall alienate and transfer to the Plaintiffs within six (6) months from the date of this Order two (2) acres of contiguous leasehold (99 years) land of international status free from encumbrances for commercial development located within the lands held under title deeds No PTB 22055 HS(D) 446607 and PTB 22056 HS(D) 446608, both in Bandar Johor Bahru, the exact location and the plotting of the coordinates of these two (2) acres of land shall be shown in the plan attached to this Order and marked 'A'. These two (2) acres comprised reclaimed land to be alienated and shall be delivered by the Defendants to the Plaintiffs with infrastructure inclusive of road access to be delivered within two (2) years from date of this Order. Any extension must be mutually agreed by the Parties. The Plaintiff shall only be required to pay to the Defendants a nominal premium of RM1 for one (1) Block Title of the said two (2) acres;

2. The Defendants shall alienate and transfer to the Plaintiff within six (6) months from the date of this Order not less than ten (10) acres of contiguous leasehold (99 years) land of international status free from encumbrances for mixed development held under title deed No ... Mukim Pulai, Daerah Johor Bahru located in Bandar Uda Utama, bordered by Jalan Uda Utama 3/8 to the south and Sungai Melana to the north, as shown in the plan attached to this Order and marked 'B'. The alienated land shall be of international status without any condition for low-cost housing imposed thereon and the Plaintiffs shall only be required to pay to the Defendants a normal premium for the said ten (10) acres;

3. The Plaintiffs may apply to the State Authority within two (2) years from the date of this Order and the Defendants shall identify the same for forty (40) acres of freehold land free from encumbrances for mixed development located within a fifty (50) kilometer radius of Johor Bahru Town. These forty (40) acres of land need not be contiguous provided each non-contiguous lot shall not be less than ten (10) acres each unless agreed by the Plaintiff for smaller acreage. The Defendants shall use its best endeavour to assist the Plaintiffs in getting approval of the said application of the Plaintiffs. The Plaintiffs shall only be required to pay to the Defendants a normal premium of the lots comprised in the said forty (40) acres.

4. Each party shall bear its own costs.

The certificate of judgment and the second consent order

[7] The applicant however asserted that despite numerous reminders, the proposed contemnors failed to comply with the first consent order. The applicant had then applied for a certificate of judgment under s 33(1) of the Government Proceedings Act 1956 ('the s 33(1) application').

[8] The proposed contemnors however on 14 January 2013 *consented* to the s 33(1) application, and parties accordingly *agreed* amongst others, that:

(a) a certificate of judgment be issued against the proposed contemnors in relations to prayers two and three of the first consent order ('the certificate of judgment'); and

(b) the proposed contemnors were to comply with their obligations under prayers two and three of the first consent order within a period of three months from 14 January 2013, ie by 14 April 2013 (collectively referred to as the 'certificate of judgment' and the 'second consent order').

The 6 February 2013 order

[9] The s 33(1) application in respect of prayer one of the first consent order was heard subsequently on 6 February 2013 where it was ordered that a sum of RM26m be paid by a third party for the proposed contemnors to the applicant as consideration for the removal of the applicant's caveat over two acres of land which formed the subject matter of prayer one of the first consent order ('the said caveat') (the 6 February 2013 order). The applicant had earlier lodged the caveat subsequent to the first consent order being recorded.

[10] The certificate of judgment and the second consent order as well as the 6 February 2013 order were served on the Johor State Legal Advisor's Office ('the SLA') on 25 March 2013. The proposed contemnors were at all times represented by the SLA. The said caveat was removed and the sum of RM26m paid to the applicant by the third party on or about 14 February 2013.

[11] The applicant had vide its letter dated 26 March 2013 wrote to the proposed contemnors to act and comply with the terms of the second consent order by 14 April 2013 (being the deadline for compliance as provided for under the second consent order). This letter was also copied to the SLA. The applicant subsequently issued a reminder dated 5 April 2013 to the second proposed contemnor demanding compliance by 14 April 2013. This letter was also copied to the SLA. However, the non-observance of the first consent order,

the certificate of judgment and the second consent order persisted notwithstanding the court's sanctioned agreements amongst the parties.

The mandamus order

[12] Dissatisfied with the continued non-adherence on the part of the proposed contemnors to the first consent order, the certificate of judgment and the second consent order, the applicant had on 9 May 2013 filed an application for judicial review, seeking, inter alia, an order of mandamus to compel the proposed contemnors to comply with the certificate of judgment and the second consent order. Leave having been granted to commence judicial review proceedings against the proposed contemnors on 21 June 2013, the substantive judicial review proceedings, contested by the proposed contemnors, concluded on 6 February 2014 where the High Court allowed the application and granted the mandamus order against the proposed contemnors. The mandamus order was a final order. The proposed contemnors did not appeal to the Court of Appeal against the mandamus order. The key terms of the same read as follows:

> ADALAH DIPERINTAHKAN Semakan Kehakiman untuk suatu Perintah Mandamus memaksa Responden-Responden untuk mematuhi sepenuhnya syarat-syarat dan kesan Perakuan Perintah bertarikh 14.1.2013 dalam Mahkamah Tinggi Johor Bahru Guaman Sivil No 22–290–2005 dan Perintah Persetujuan bertarikh 14.1.2013 dalam Mahkamah Tinggi Johor Bahru Guaman Sivil No 22–290–2005 dan untuk melaksanakan dan melengkapkan sepenuhnya kewajipan dan tanggung-jawab mereka kepada Pemohon di bawah Perintah-perintah tersebut.

For clarity, perakuan perintah is the certificate of judgment and perintah persetujuan is the second consent order, both dated 14 January 2013, and are referable to the underlying first consent order of 14 December 2009.

[13] On 2 March 2014, the mandamus order was served on the SLA. The applicant had by its letter dated 4 March 2014 written to the first proposed contemnor seeking compliance with the mandamus order. The said letter was copied to the second and third proposed contemnors. Despite the applicant and the proposed contemnors having communicated on the mandamus order in the period since the service of the mandamus order on the SLA and the letter of 4 March 2014, to date, the proposed contemnors have however yet to comply with the mandamus order.

KEY PRINCIPLES OF THE LAW OF CONTEMPT

[14] The law of contempt is integral to the administration of justice. Its overarching purpose is to promote the confidence of the public in the integrity of the system of justice and supremacy of the law. *Oswald's Contempt of Court* (3rd Ed) offers a definition in the following terms:

> ... Contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with, or prejudice parties, litigants or their witnesses during trial.

The imperative of safeguarding the dignity and integrity of the Federal Court, the Court of Appeal and the High Courts is encapsulated in art 126 of the Federal Constitution, conferring on the courts the power to punish for contempt, a provision which is similarly found in s 13 of the Courts of Judicature Act 1964.

[15] Contempts are generally of two types. In the case of *Tan Sri Dato (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849, Arifin Zakaria CJ succinctly explained the point in the following manner:

> Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general conduct for interfering with the due administration or the course of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v Newspaper Publishing Plc*, at p 362:
>
> > Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order; and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to all contempts per Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at p 449.

[16] In an earlier decision of the Federal Court of *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241; [2002] 4 CLJ 401, Haidar FCJ held that contempt of court is interference with the due administration of justice and that more importantly the categories of contempt are never closed. In the instant case however, it is clear that the committal proceedings are concerned with the allegation of the failure by the proposed contemnors to comply with a court order, specifically the mandamus order.

[17] It is well established that committal proceedings are criminal in nature since the same involve the liberty of the alleged contemnor (see *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors*). In *In re Bramblevale Ltd* [1970] 1 Ch 128 Lord Deaning MR in his characteristic inimitable style stated the principle on the applicable standard of proof for contempt proceedings:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactory proved. To use the time – honoured phrase, it must be proved beyond reasonable doubt.

[18] Accordingly, the law has additionally provided for procedural safeguards to be adhered to, not only before one can be ordered to be committed, but also even prior to the commencement of the committal proceedings. A fundamental safeguard is the requirement for leave, as embodied in O 52 r 3 of the Rules of Court 2012 ('the ROC 2012'). Given that the central issue in the instant case concerns the granting of leave to commence committal proceedings, the entirety of O 52 r 3 is set out hereunder:

> Application to Court (Order 52 r 3)
>
> 3(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[19] Pursuant to O 52, committal for contempt of court therefore involves a two-stage process. The first is the leave application and secondly, if leave is granted, an application for an order for committal may then be filed within 14 days after the granting of leave (O 52 r 4(2)). This instant case concerns only *the leave stage*. Order 52 does not however elaborate on the test to be applied when evaluating the suitability of acceding to any leave application but it is crucial that the two documents specified in O 52 r 3(2) to be in support of the leave application be thoroughly examined. These are the statement describing amongst others, the alleged contemnor, and the grounds on which he is alleged to be in contempt ('O 52 statement') and an affidavit verifying the facts relied on. I shall now discuss the legal principles governing the granting of leave and the requirements pertaining to the contents of O 52 statement.

TEST FOR GRANTING LEAVE

Requirement for prima facie case

[20] My review of the relevant case law authorities suggests that it should by now be considered settled law that leave to file committal proceedings will be granted if a prima facie case of contempt can be established. In the case of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217, Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, stated as follows:

> In the appeals before us, leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted that there was a *prima facie case for contempt* against the appellants. It may well be that on the hearing of the

A motion proper, the appellants will be acquitted of any charge of contempt ... (Emphasis added.)

[21] In *Dato' Oon Ah Baa @ Boon Pak Leong & Others v Eagle & Pagoda Brand Teck Aun Medical Factory & Others* [2003] MLJU 291; [2003] 7 CLJ 81 the High Court made the following observation:

B

> In other words, the test required to be met before leave is granted is that the applicant must satisfy that there is a *prima facie case of contempt* (see *Ngu Yen v Canada (Minister of Citizenship And Immigration)* [1996] FCJ No 1478 (TD) (QL). (Emphasis added.)

C

The following passage in a decision of the High Court in *Foo Khoon Long v Foo Khoon Wong* [2009] 9 MLJ 441 is no less instructive:

D

> At the time when the court had granted leave on 11 June 2007, it is pertinent to observe that there was only a *prima facie case of contempt* which was based on an ex parte application. In other words, it is merely a vetting process on an ex parte basis to consider if there was a prima facie (case) of contempt and the court did not go into the merits ... (Emphasis added.)

E

[22] The exact formulation of what constitutes 'prima facie' in this context does not appear to have been definitively stated. Cases such as *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLJ 191 and *Ronald Philip Devereux & Anor v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors* [2012] 4 MLJ 665 affirmed that the threshold to be satisfied at leave stage is the prima facie test, without discussing what it entails precisely. Indeed whilst there is an abundance of case law authorities on committal proceedings, the preponderance of which however concerned disputes at the subsequent committal stage or for the setting aside of the leave which, especially for the former, hardly needed to touch on the threshold and prior issue of the ambit of the prima facie test for leave to be granted.

F

G

[23] The case of *Foo Khoon Long* referred to earlier had already suggested that the prima facie test involves 'merely a vetting process'. A decidedly more detailed endeavour to define the scope of leave in this context can be found in a recent case of *Tan Kang Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] 4 CLJ 113, where the High Court, after reviewing the relevant legal position and noting the absence of the meaning of 'prima facie' case and on the standard of proof required for leave to commence committal proceedings, stated the following principles concerning the leave requirement:

H

I

(a) the purpose of the leave requirement is to ensure that there is no abuse of the committal procedure. The leave requirement acts as a sieve to ensure that there is a prima facie basis for the committal application;

(b) the purpose of the leave requirement is to prevent abuses of the committal procedure. Such a purpose may be fulfilled without the need for such a high standard of proof beyond all reasonable doubt;

(c) a prima facie case of contempt of court is satisfied if:

(i) the statement and verifying affidavit show that the respondent in question has committed a specie of contempt of court, for example, the respondent has breached an injunction or court order; and

(ii) the contents of the verifying affidavit should not be inherently improbable; and

(d) the court should keep an open mind and not make any finding of fact as an application for leave to commence committal proceedings is made on an ex parte basis (without hearing the respondent) and the respondent may still raise a reasonable doubt at the end of the committal proceedings.

Other procedural safeguards

[24] I agree with this approach. I find no compelling reason to depart from the said principles. However what I should highlight is that whilst it is now plain that prima facie means the O 52 statement must show a contempt has been committed and the contents are not inherently improbable, there ought to be better clarity in the law on the factors that the court should and should not consider when evaluating the leave application. Some of these factors may well be addressed by way of being incorporated in the requisite O 52 statement to the extent that they are so required to be included (more on the contents of the O 52 statement later). I am of the view that given the rationale of the leave requirement, the prima facie test and the lower standard of proof, the factors that ought to be considered by the court should in principle generally only be confined to items specified in or contemplated under O 52 r 3 (or the O 52 statement). The many case law authorities which involved challenges premised on issues such as personal service, penal notice, clarity of the terms alleged to have been breached, the time required for full compliance, amongst others are invariably discussed and adjudicated at the post-leave stage because only at inter parte stage would the alleged contemnor appear and raise these issues where relevant. Further, although there is a requirement that there must be full and frank disclosure of relevant facts in the O 52 statement, this is principally pertaining to the grounds constituting the alleged contempt that may be raised by the proposed contemnors, objecting to the application if it were an inter parte hearing (see further below in respect of the O 52 statement).

[25] Accordingly, examples of cases concerning disputes such as:

(a) on time for compliance of a judgment order, which is a requirement of O 42 r 6 of the ROC 2012 (on judgment requiring act to be done: time for doing it) (for instance, see *Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Anor* [2004] 4 MLJ 384; [2003] 1 AMR 206 which ruled non-compliance to be fatal); and

(b) on personal service and endorsement of penal notice which are pursuant to O 45 r 7 of the ROC 2012 (on service of copy of judgment or order prerequisite to enforcement under r 5) (see for example *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601; [1994] 2 CLJ 705 and *Plastech Industrial Systems Sdn Bhd v N & C Resources Sdn Bhd & Ors* [2013] 10 MLJ 837 which ruled constructive knowledge to be sufficient and penal notice unnecessary)

are rightfully only expected to be fully adjudicated at the setting aside proceedings or at the committal stage when the court is to consider whether a case for committal has been proven beyond reasonable doubt. This in my view is a sensible legal proposition given the fundamental features relevant to leave application; it being ex parte, the test being prima facie with a lower standard of proof and where the focus is on the adequacy of the O 52 statement. This is well in accord with the principle enunciated in the case of *Wee Choo Keong* as referred to earlier. This is also consistent with the rule that, at the leave stage, the court should not venture into deliberating on the merits of the committal application as the alleged contemnor should, at the committal stage, be afforded the full opportunity to answer and challenge the allegations against him by filing an affidavit-in-reply for that purpose.

[26] Even cases which involve setting aside of leave such as the Supreme Court decision in *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193, the Federal Court case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors* and the Court of Appeal decision in *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541; [2013] 1 CLJ 1060 are concerned primarily with issues on the sufficiency of disclosure and contents of the requisite O 52 statement, which are clearly matters within the framework of O 52 of the ROC 2012.

[27] Further, there is Singapore case law authority which suggested that the grounds for objecting to the granting of leave are fairly limited. It should be stated that O 52 of the ROC 2012 is closely based on the former Rules of the High Court 1980 which in turn was modeled upon O 52 of the English Rules of Supreme Court 1965, and is almost identical to the present O 52 r 2 of the Singapore Rules of Court. In the case of *Ang Boon Chye and another v Ang Tin Yong* [2011] SGHC 124, the plaintiffs applied for leave to take committal proceedings against the defendant for the failure of the latter to lodge the

accounts of a partnership as required by a court order. As the plaintiffs notified the defendant of their application, the defendant filed an affidavit and opposed the leave application. The High Court found that the affidavit did not address the court order said to have been disobeyed nor explain his failure to comply with it, and concluded in making the following ruling:

> The defendant should intervene and object to the plaintiffs' application at the preliminary stage only in exceptional circumstances such as:
>
> (a) the Order of Court had been complied with;
>
> (b) the plaintiffs waived their right to the accounts;
>
> (c) the plaintiffs had undertaken not to take out committal proceedings, or on other grounds which go to the plaintiffs' entitlement to apply for leave to commence committal proceedings.
>
> If the defendant's position is that although he had not complied with the Order of Court, his failure did not tantamount to contempt of court, then he should hold back, and put forward his case at the second stage of the proceedings when the plaintiffs apply for an order of committal against him.

[28] The decision of the High Court was reversed by the Court of Appeal in *Ang Tin Yong v Ang Boon Chye and another* [2011] SGCA 60 but purely on the sole ground that the plaintiffs lacked locus standi to apply for leave to commence committal proceedings in the first place. The test enunciated by the High Court on the limited circumstances to challenge application for leave is in my judgment in keeping with the fundamental test of prima facie to be applied at this stage.

[29] Accordingly, it is my view that the proposition in law that can be distilled from the foregoing authorities is that given the nature of the leave application which is on the basis of ex parte, the applicant would only need to establish a prima facie case of contempt on a balance of probabilities, focusing on the evaluation of the O 52 statement (to determine there is contempt, and that the grounds are not inherently improbable). Matters concerning other procedural safeguards, which are not strictly related to the grounds of application within the ambit of O 52 r 3, if however raised and considered at the leave stage would similarly be subject to the same prima facie test. I shall now discuss the requirements governing the O 52 statement.

THE O 52 STATEMENT

The test of sufficient particularity

[30] The critical importance of the O 52 statement cannot be emphasised enough. Given its specific mention in O 52 r 3 which governs the application for leave, it is absolutely pivotal that the court assess the sufficiency of the O 52

statement at the leave stage prior to it be granted to commence the substantive committal proceedings.

[31] In *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112, the High Court ruled that the grounds on which an order of committal is sought as set out in the O 52 statement must be set out with sufficient particularity to enable the person alleged to be in contempt to meet the charge. Vohrah J referred with approval to the following passages from the judgment of Nicholls J in *Harmsworth v Harmsworth* [1987] 3 All ER 816:

> So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the rules of Court and as I understand the decision in the *Chiltern* case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place. I do not think, therefore, that if there are deficiencies in the notice issued on 22 June, these deficiencies should be regarded as having been cured by reason of the references in para 1 to the affidavit attached to the notice and in para 2, to the affidavit accompanying the notice.

[32] Although *Sykt M Mohamed* concerned the substantive committal stage, it is the correct position in law that the examination on the test of sufficient particularity of the O 52 statement must be judicially performed at the leave stage. The Court of Appeal in *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541; [2013] 1 CLJ 1060 made it clear that any question whether an ex parte leave to commence committal proceedings is wrongly obtained must be dealt with first since it is the foundation in the process of committal proceedings. The following passages from the judgment of Abdul Wahab Patail JCA highlight the significance of a full and frank disclosure of relevant facts in the requisite O 52 statement, as follows:

> It must also be borne in mind that the application for leave to commence committal proceedings is made ex parte. To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an ex parte application, it

means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the ex parte application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily become a tool exploited for oppression.

[33] The importance of the O 52 statement was further emphasised by Arifin Zakaria CJ in *Tan Sri Dato (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849 in the following terms:

We wish to state in clear term that the alleged act of contempt must be adequately described and particularized in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang* case (see also *Sykt M Mohamed v Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16.)

[34] The very essence of the insistence on the adherence to sufficient particularity of O 52 statement is so that a proposed contemnor is fully aware of the case of contempt instituted against him. This is the rationale for the grounds of the application to be clearly described in the O 52 statement, and to be verified by the accompanying affidavit in support, as clearly stipulated under O 52 r 3(2) of the ROC 2012.

[35] That is the evaluation that must be done to ascertain whether there is a prima facie contempt before the matter can be allowed to progress further. The requirement of full and frank disclosure as emphasised in *Tan Sri G Darshan Singh* reinforces and represents another facet of the same emphasis on absolute transparency of relevant facts pertaining to the grounds which are contended to tantamount to a contempt of court. It does not strictly require and nor does the test of sufficient particularity demand that compliance with other matters relating to procedural safeguards such as on penal notice, personal service and the like must be similarly evaluated. If they do get raised and considered, however, the same prima facie test should apply, for otherwise the ex parte leave stage could be engaged in a forum which should rightfully belong to the jurisdiction of the court at the subsequent inter parte committal stage, unless a

defect affecting such procedural safeguards discovered at the leave stage is so very fundamentally serious, incurable and fatal to the extent that any grant of leave to proceed to the committal stage would be an entirely pointless exercise in futility.

No concerns on sufficient particularity

[36] In the instant case, having examined the entirety of the O 52 statement and the affidavit in support of the application by the applicant, I am of the view that the requirement of sufficient particularity has clearly been satisfied by the terms of the disclosure contained therein. There is no justifiable basis to suggest (should one be advanced) that the proposed contemnors have not been given, let alone apprised of the true and full grounds on the case of committal against the proposed contemnors. As made manifest in the O 52 statement and referred to earlier in this judgment, the fact, nature and essence of the obligations of the proposed contemnors, which originally came about from the civil suit filed in 2005, and crystallised in the first consent order, specifically in prayers two and three, have remained exactly the same (for the certificate of judgment, second consent order and mandamus order for all intents and purposes, in fact and law effectively reinforce the obligation to comply with prayers two and three of the original or first consent order) and throughout the period that ensued until presently, thus countering any possible argument on the lack of knowledge of the basis of the charge of contempt. These obligations, based on the O 52 statement, have been nothing more than what appeared to be empty promises, repeatedly made but remained continually unfulfilled.

Issues on procedural safeguards raised by court

[37] I am also satisfied that even though I am not strictly required at this ex parte leave stage to examine adherence by the applicant to the other requisite procedural, albeit technical safeguards, especially in the absence of any evidence from the proposed contemnors, there are no cogent reasons to deny leave purely on the ground of concerns on non-compliance with any of these procedural requirements. I raised two specific concerns, the clarifying response by the counsel for the applicant to both of which, in my assessment, justify the finding that such possible non-compliance at the prima facie level are not fatal to the application by reason primarily of supporting case law authorities as submitted by the applicant, thus permitting the issues being revisited and more properly challenged by way of affidavit evidence at the subsequent stage of committal (with the higher standard of proof) should the same be raised by the proposed contemnors in the inter parte forum.

[38] Briefly, the first issue is the absence of penal notice and the second is the doubt on whether the mandamus order had been personally served on the

proposed contemnors (instead of merely on the SLA). The legal literature on these points includes cases which support both opposing stance. As mentioned, at this leave and prima facie stage I accept the position taken by the applicant noting that these issues could be further adjudicated upon at the committal stage with the benefit of affidavit evidence from the proposed contemnors, if they view these are truly concerns worthy of being raised and challenged then. Thus in *Plastech Industrial Systems Sdn Bhd v N & C Resources Sdn Bhd & Ors* [2013] 10 MLJ 837, the High Court ruled that personal service was not necessary where the proposed contemnor has constructive notice, and especially when he has the benefit of advice from solicitors. Further, in the case of *Madlis Azid @ Aziz & Ors v Chua Yung Kim & 3 Ors* [2012] 5 AMR 344, the High Court dispensed with personal service of an injunction order since the proposed contemnor in that case asked the solicitors to apply for a stay and at the same time knew that the injunction was the main order directed against him. Further, in any event, under O 45 r 7(7) the court has the power to dispense with service of an order if it thinks it just to do so. Similarly, in an earlier case of *Allport Alfred James v Wong Soon Lan* [1989] 1 MLJ 338 the defect in not complying with the indorsement of the penal notice was ruled not fatal so long as the defendant had knowledge of the order in question.

[39] In the instant case, the representative of the SLA was present when the mandamus order was granted by the court, the proposed contemnors were requested by the applicant in writing (vide letter of 4 March 2014) to adhere to the terms of the mandamus order, and there had also been subsequent communication between the applicant and the proposed contemnors on the mandamus order between the date of service of the same on the SLA on 2 March 2014 and the letter to the first proposed contemnor on 4 March 2014 (copied to the second and third proposed contemnors). At this leave stage, I am therefore satisfied that the proposed contemnors have notice and knowledge of the terms of the mandamus order. Indeed in the case *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, the Federal Court ruled that in the matter of contempt arising out of disobedience to an injunction, the test is to ask whether the proposed contemnor knows of it. It need not be necessary that he should be served. The former Supreme Court in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601; [1994] 2 CLJ 705 ruled that service of the relevant court order was not essential, for all that is required is for the proposed contemnor to have notice of the order said to have been breached. Thus a fortiori, equally unnecessary in this situation is the need for indorsement of the penal notice (see also *Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor* [1997] 5 MLJ 209 and *Lembah Mayang Sdn Bhd & Others v Pengarah Jabatan Perhutanan & Anor* [2004] MLJU 201; [2004] 6 CLJ 465). Additionally, although it is trite that as mentioned earlier, a committal order can only issue if the contempt is proven beyond reasonable doubt, I am also not unmindful of

the principle, expressed by Lord Woolf MR in the case of *Nicholls v Nicholls* [1997] 147 NLJR 61, that if there is non-compliance with the procedural requirements which does not prejudice the proposed contemnor, setting aside the order purely on the grounds of technicality is contrary to the interest of justice. This was followed in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240 and *Majlis Perbandaran Melaka Bandaraya Bersejarah v Yau Jiok Hua* [2006] 5 MLJ 389. The Supreme Court in *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 too earlier expressed a similar rule, making a distinction between non-observance of rules and mere technical irregularity.

OTHER EVALUATION AND FINDINGS BY THIS COURT

Counsel for proposed contemnors appeared at ex parte application

[40] An important factor which is worthy of more than a mere mention in the instant proceedings is that counsel for the proposed contemnors (namely, the SLA) were informed of the ex parte application for leave and did as a result appear to submit their opposition to the application. At the first hearing on 12 July 2015, I raised queries pertaining to personal service, penal notice and clarity on time for compliance. In the course of his submission, counsel for the applicant, indicated that the applicant would not object to the cause papers on the leave application be notified to the SLA, on behalf of the proposed contemnors, and for them to appear in court to oppose the application, if they so wished. Although not cited by counsel, I was already then aware of the case law authority of *Dato' Oon Ah Baa @ Boon Pak Leong & Others v Eagle & Pagoda Brand Teck Aun Medical Factory & Others* [2003] MLJU 291; [2003] 7 CLJ 81 which suggested that it is not unusual for the alleged contemnor's counsel to be present in court where he is made aware of the application. VT Singam J in that case made the following observation:

> In *London City Agency Ltd v Lee* [1970] 1 Ch 597, the plaintiffs had obtained an interlocutory injunction granted ex parte by the Vacation Judge, His Lordship Eveleigh J. The defendants then filed an ex parte application to discharge the interlocutory injunction granted ex parte. In varying the said interlocutory injunction, His Lordship Megarry J observed:
>
> > Although the application before me is made ex parte, counsel for the plaintiffs has been present and has considerably assisted the court.
>
> Accordingly, and based on the observation of His Lordship Megarry J, this court is of the view that although the plaintiffs' application for leave was made ex parte, there was nothing irregular for the said defendants' counsel to be present in court where the said defendants became aware of this application and if necessary to assist the court if called upon even in an ex parte application. In any event, it is important to stress that the ex parte application in the instant case was not converted into an inter parte hearing when the said defendants' counsel was granted permission to

address the court (see *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd & Anor* [1972] 1 WLR 1213).

Be that as it may, the approach of the court in an application for leave which is actually at a permission stage was to consider whether the applicant has shown or demonstrated a prima facie case of contempt and this process is conducted ex parte and in the absence of the alleged contemnor. It is important to state at this stage that the hearing of the ex parte application for leave is not an adjudication on the merit of the case, (see *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58)

...

Nevertheless, the courts still have the discretion to order an ex parte application to be heard inter parte with the necessary directions if the circumstances so warrant and this discretion must no doubt be exercised judiciously. In *Chuan Huat Lin Lime Factory v Yap Chee Seng & Ors* [1996] 1 BLJ 141 at p 142, His Lordship KC Vohrah J (as he then was) had ordered the ex parte application for leave to commit the defendant to prison for a breach of an injunction order to be heard inter partes as the court wanted to hear arguments whether in the first place there was a prima facie case of contempt. However, in that case the court did not refer to the affidavit filed by the defendant.

[41] In the instant case, I exercised my discretion to have the application served on the counsel for the proposed contemnors with a view to inviting the state legal advisor's office to assist the court and appear and submit their opposition to the leave application which in any event remained ex parte in nature. There was no direction for the proposed contemnors to file any affidavit-in-reply so as to prevent concerns that this would defeat the very objective of the relevant rules in O 52 r 3 making it ex parte in the first place and for the leave stage not to concern itself with the merits of the case (see *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193). Counsel from the SLA filed a written submission and appeared at the continued hearing on 2 September 2015.

Submissions by proposed contemnors opposing the leave application

[42] It should be highlighted at the outset that neither the written submission of the SLA for the proposed contemnors nor the oral arguments raised by representatives of the SLA at the hearing include or refer to any issue pertaining to procedural or technical safeguards such as in the nature of the concerns I alluded to at the first hearing of the application. Thus no concerns were expressed by the proposed contemnors on items such as penal notice, personal service and time for compliance. The proposed contemnors however denied having refused to comply with the first consent order of 14 December 2009 or the mandamus order dated 6 February 2014 on the basis of arguments which I have summarised as follows:

First ground – no committal order can be made against the proposed contemnors

[43] The proposed contemnors argued that no enforcement of court orders can be made against them by virtue of O 73 r 12 of the ROC 2012 which reads as follows:

> Nothing in Orders 45 to 52 shall apply in respect of any order against the Government.

[44] The proposed contemnors submitted that the appointment of the Menteri Besar under art 3 of the Constitution of Johor as the 'Chief Minister and Senior Executive Officer of the State' meant that the Menteri Besar is acting in the capacity of the chief minister on behalf of the Johor State Government. This, it was argued, effectively made the Johor State Government a party to the suit given that the action against the Menteri Besar is not in his personal capacity but instead on the basis of his official capacity. Similarly, the Pengarah Tanah dan Galian Johor is also an official appointed by the Johor State Government, whose official actions are performed on behalf of the Johor State Government and therefore fall within the protection under O 73 r 12 of the ROC 2012. The third proposed contemnor, the Unit Perancang Ekonomi Johor is merely an administrative unit under the state secretary and thus not capable in law of being ordered for committal under O 73 r 12.

Order 73 r 12 extends only to the federal and state governments

[45] In my view, a short answer to the contention of the proposed contemnors is that O 73 r 12 is limited in its scope for the same only excepts the federal government or the state government. This is made crystal clear in the definition of 'government' in the definition section of the ROC 2012 in O 1 r 4. A similar definition is found in the Government Proceedings Act 1956 ('the GPA') which provisions must be read together with the entirety of O 73 of the ROC 2012 which concerns proceedings by and against the government. Section 2(2) of the GPA defines 'government' less definitively as 'includes the Federal Government and the governments of the states'. Furthermore, O 73 r 1 defines 'order against the government', a phrase appearing in O 73 r 12(1) as follows:

> 'order against the Government' means any order (including an order for costs) made in any civil proceedings by or against the Government, or in connection with any arbitration *to which the Government is a party*, in favour of any person against the Government or against a Government department or against an officer of the Government as such. (Emphasis added.)

This therefore makes it clear that although the order may be capable of being made against government departments or government officers, the government must be a party against whom the civil proceedings are instituted in the first place. This is manifestly not the position in the instant case.

[46] The proposed contemnors also submitted on the case of *Kerajaan Negeri Trengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2)* [2013] 7 MLJ 145; [2013] 1 CLJ 124 where the High Court held that the Menteri Besar could maintain an action for defamation if he sued the defendants in his personal capacity. However, he has no legal capacity to sue the defendants in his official capacity as the Menteri Besar of the State of Terengganu. It was further held as follows:

> The Menteri Besar, even though he is appointed by the State Ruler, acts in the name and on behalf of the State Government. Since the State Government has been held to have no capacity to maintain the action for defamation against the defendants, it follows that the position of the Menteri Besar is no different from that of the State Government.

[47] I fail to appreciate how this case can assist the contention of the proposed contemnors. It pertains an action in defamation, not an order for committal. It has no relevance to O 73 r 12. There is no discernible basis to suggest that the case supports the argument that no committal proceedings can lie against the Menteri Besar because he acts on behalf of the state government. That case merely states that the Menteri Besar is no different from the state government he acts on behalf of purely because in the context of defamation law which is personal in nature, the state government has no capacity to maintain the same. Thus in performing his official function the Menteri Besar was also ruled not to have such capacity. The decision in Kerajaan Negeri Terengganu is also founded on a policy consideration. The High Court held in an unambiguous fashion as follows:

> Due to strong public interest considerations, any person, whether a Chief Minister, Minister or Prime Minister may maintain an action for defamation in his personal capacity, but not in his official capacity. To allow such person – for instance the second plaintiff as Terengganu Menteri Besar in the instant case – would intimidate members of the public and strike fear in them, thereby stifling or discouraging constructive public criticism where such criticism is necessary for the public good. Any threat of civil action for libel by a Chief Minister or any other Minster, in an official capacity, would have a 'chilling effect' and be detrimental to the constitutional right of freedom of speech in a civil and progressive society ...

Therefore *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors* is far from being in any way comparable with or analogous to the instant case where there is no compelling reason why O 73 r 12 should extend to insulate Menteri Besar or any officer of the State or Federal

Government from the rigours of civil enforcement proceedings.

Relevance of the Government Proceedings Act 1956 ('the GPA'):

[48] It is worthy of emphasis that O 73 r 12(2) refers to the special mode of enforcement of monetary judgment against the government pursuant to s 33(1) of the GPA in the following terms:

> Order 73 r 12(2) of the Rules of Court 2012
>
> An application under the proviso to subsection (1) of Section 33 of the Government Proceedings Act 1956 for a direction that a separate certificate shall be issued under that subsection with respect to the costs, if any, ordered to be paid to the applicant, may be made to the Court ex-parte by notice of application.
>
> Satisfaction of orders against the Government (Government Proceedings Act 1956)
>
> 33 (1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:
>
> Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
>
> (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the advocate for the Government or for the Government department or officer concerned.
>
> (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:
>
> ...
>
> (4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

[49] It is well established that s 33 of the GPA, read together with O 73 r 12(1) provide to the effect that the only method of enforcing *monetary* judgment against the government is by obtaining a certificate under the section. The Federal Court in the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321 held that the failure to pay the judgment sum appearing on the certificate is tantamount to a deprivation of property in violation of art 11 of the Federal Constitution. The Federal Court stated the following:

> ... there is a duty on the part of Government to pay the amount stated in the certificate issued under Section 33(3) of the GPA to the respondent. It is not a matter of discretion for the Government whether to pay or not to pay. As a statutory duty it is of course binding on the State Government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus.

[50] The point of relevance to the instant case however is twofold. First, the applicant in the instant case did similarly invoke s 33(1) of the GPA against the proposed contemnors, as stated earlier in the judgment in respect of the certificate of judgment and the second consent order, following agreement between the parties on 14 January 2013, which the applicant submitted were nonetheless not complied with by the proposed contemnors, despite the initial agreement, therefore resulting in the mandamus order. The similarly with the instant case stops there.

[51] Secondly, *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* provides in no uncertain terms the authority for the legal rule that *as against the government*, one cannot resort to any of the enforcement procedures under O 45 to O 52 of the ROC 2012, and that the only process allowed for this purpose is as expressly provided in s 33 of the GPA. The Minister of Finance, Government of Sabah was named a party in the proceedings under s 33 of the GPA because s 33 provides for payment to be made by an officer of the government. In this case, the aggrieved party sought to institute judicial review proceedings, specifically to obtain the relief in the form of the order of mandamus to compel payment by the state government in accordance with the s 33 certificate. The Federal Court granted the application. Arifin Zakaria FCJ (as His Lordship then was), stated the following important principles:

> Thus it must be brought to bear on the State Government that the GPA is not there to enable the Government to flout the law, it merely provides a special procedure in order to avoid the embarrassment of execution proceeding being taken against the State Government. I think it is reasonable to expect the State Government to act with honour and responsibility and the appellant in the present case is no exception. I do not wish to go into the issue why the State Government had acted the way they did in the present case. It is never in dispute that the respondent is in law entitled to the judgment as specified in the certificate. Therefore, I agree with the respondent

A that in the context of s 33(3) of the GPA the word 'shall' connotes an obligation to pay. The fact that in s 33(3) of the GPAit is provided that 'pending an appeal or otherwise' the Government may apply for a stay or suspension of the payment, would go to further strengthen the respondent's contention. Had the duty to pay not being mandatory in nature there is no necessity for the Government to apply for
B a stay or suspension of payment. For the above reasons I am satisfied that in the context of s 33(3) of the GPA the word 'shall' obtaining therein is obligatory in effect.

The position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the Crown can do no wrong.
C *Therefore, the courts in the Commonwealth jurisdictions generally have held that the executive arm of the Government is amenable to the judicial review proceedings*. In the landmark case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at p 953 Lord Roskill said:

> D Historically the use of the old prerogative writs of certiorari, prohibition and mandamus designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government ... *this branch*
> E *of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue*. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds .... (Emphasis added.)

F **[52]** In any event however *Petrojasa* does not concern committal proceedings. As such, contrary to the submission of the proposed contemnors, this case is no support for the contention that a Minister or an officer of the government is similarly protected under O 73 r 12 which provisions proscribe against committal proceedings being instituted against the federal and state
G governments. In the instant case, not only have the applicant sought to institute proceedings under s 33 of the GPA, they have additionally also successfully (like the respondent in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*) obtained the mandamus order against the proposed contemnors. Indeed the case of contempt against the proposed contemnors is
H essentially based on the said breach of the mandamus order.

[53] In *Minister of Finance Government of Sabah v Petrojasa Sdn Bhd*, Arifin Zakaria FCJ (as His Lordship then was) made the following important observation which is of considerable significance to the instant case:

I

> In the local case of *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; [1978] 1 LNS 202 the Privy Council intimated that even though under art 32(1) of the Federal Constitution the Yang di Pertuan Agong is immuned from any proceedings whatsoever in any court, therefore, an order of mandamus would not lie against his Majesty *but that would not prevent a mandamus be granted against the members of the*

Cabinet requiring them to advise the Yang di Pertuan Agong to act in a certain way. (Emphasis added.)

[54] In my view, this ground-breaking principle that establishes that the executive arm of the government, and the ministers in particular, are not immuned from the public law remedy of judicial review (for purposes of ensuring compliance with s 33(3) of the GPA certificate despite s 33(4) providing that no execution process shall be issued by any court to enforce payment by the government) should be extended and made to be similarly applicable to enforcement proceedings in the nature of application for committal orders against ministers. This would do much to vindicate and uphold the sanctity of the law by reinforcing the public law remedy of judicial review or other court orders with the coercive mechanism of a finding of contempt of court. At the same time, O 73 r 12 ought to be construed strictly to be in reference and apply only to the specific legal entities of the federal and state governments per se and not insulate ministers and other officers of the federal or state governments from contempt proceedings.

Finding of contempt may be made against ministers

[55] Whilst the evolution of the law in Malaysia is no doubt a continuing process, as envisioned by Arifin Zakaria FCJ (now Chief Justice of Malaysia) in *Petrojasa*, the issue is whether the extent of the coercive powers of contempt of court would now also be available under present law to compel adherence to court orders such as reliefs granted under judicial review proceedings, against cabinet ministers as well as Menteri Besar of state governments. It is my view, for the reasons that appear in this judgment that the landscape of constitutional and administrative laws in this country has sufficiently evolved and attained the sophistication and maturity deemed integral to the well functioning of a democratic and civil society that the answer to the question is decidedly in the affirmative. It is most instructive to note that the specific issue of committal against Ministers is discussed in detail more than two decades ago in the leading English constitutional case of *In re M* [1994] 1 AC 377 referred to in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* where the House of Lords firmly ruled that the courts have the jurisdiction to make coercive orders against the crown or ministers of the crown. A minister can in law be found guilty of contempt in his official capacity.

[56] In *In re M* [1994] 1 AC 377, M, a foreign national from Zaire was deported in breach of an undertaking given by the lawyer for the home secretary not to deport him, and was not returned in breach of a court order to return him. The Home Secretary had on advice, formed the view that a mandatory interim injunction against him as an officer of the Crown had been made without jurisdiction. The court ordered that M should be taken off the

plane when it landed in Paris. The Home Secretary did not consider himself bound by the order and M was not taken off the plane. The case turned on whether Ministers of the Crown could be bound by coercive orders of the court and therefore found in contempt where they disobeyed them. The House of the Lords famously ruled that Ministers were indeed bound by orders of the court?. The House of Lords ruled that although the Crown's immunity from injunctions had been preserved (in pursuance of the Crown Proceedings Act 1947), the courts have jurisdiction to grant mandatory interim injunctions in judicial review against officers of the Crown. As a result of the violation of this injunction, while the Crown cannot be held in contempt of court, a Minister exercising his power on behalf of the Crown can be.? The Home Secretary was accordingly held in contempt of court but no punishment was imposed.

[57] The case of *In re M* was followed in *R (on application of Lamari) v Secretary of State for Home Department* [?2012] EWHC 1630 (Admin),? where only the second time in British history that a Minister has been found to be guilty of contempt of court in his or her official capacity, in this case for failing to abide by an undertaking given to release a foreign national who had completed his prison sentence from a UK Detention Centre by a specified date. Both *In re M* and *Lamari* incidentally concern immigration and deportation related cases, thus falling within the jurisdiction of the Home Secretary: then Mr Kenneth Baker and in this later case, Ms Theresa May who is the present incumbent. The High Court reiterated that the objective of the court's powers to make findings of contempt is to ensure that orders of the courts are adhered to. This jurisdiction is required to be co-extensive with the court's authority to make the very orders which need the protection that the jurisdiction to make findings of contempt provides. It was thus again made clear that whilst Ministers may be liable for contempt in their official capacity for the failures of their department, they are not liable in their personal capacity, at least in the absence of clear evidence that the contempt emanated directly from their personal default. Thus, punishment, either in the form of imprisonment or fine would be inappropriate as the court proceeds on the principled premise that a Minister will invariably always intend to respect the rule of law.

[58] The following passages from the judgments of Lord Templeman and Lord Woolf in *In re M* are of direct relevance and bear serious consideration:

> Lord Templeman:
>
> My Lords, *the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity*, a proposition which would reverse the result of the Civil War. For the reasons given by my noble and learned friend Lord Woolf and on principle, I am satisfied that injunctions and contempt proceedings may be brought against the minister in his official capacity and that in the present case the Home Office for

which the Secretary of State was responsible was in contempt. I am also satisfied that Mr. Baker was throughout acting in his official capacity, on advice which he was entitled to accept and under a mistaken view as to the law. In these circumstances I do not consider that Mr Baker personally was guilty of contempt. (Emphasis added.)

Lord Woolf:

Jurisdiction To Make A Finding Of Contempt

The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a Minister of the Crown in his official capacity. Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, *I do not believe there is any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but against a government department or a Minister of the Crown in his official capacity.*

...

Nolan LJ considered that the fact that proceedings for contempt are 'essentially personal and punitive' meant that it was not open to a court, as a matter of law, to make a finding of contempt against the Home Office or the Home Secretary. While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a Minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequest the assets of the Crown or a government department or an officer of the Crown acting in his official capacity), this does not mean that a finding of contempt against a government department or Minister would be pointless. *The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt. A purpose of the courts' powers to make findings of contempt is to ensure the orders of the court are obeyed.* This jurisdiction is required to be coextensive with courts jurisdiction to make the orders which need the protection which the jurisdiction to make findings of contempt provides. In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorised government departments or the Attorney-General. On applications for judicial review orders can be made against Ministers. In consequence of the developments identified already such orders must be taken not to offend the theory that the Crown can supposedly do no wrong. Equally, if such orders are made and not obeyed, the body against whom the orders were made can be found guilty of contempt without offending that theory, which would be the only justifiable impediment against making a finding of contempt.

...

It was appropriate to direct the injunction to the Secretary of State in his official capacity since, as previously indicated, remedies on an application for judicial review which involve the Crown are made against the appropriate officer in his official capacity. This does not mean that it cannot be appropriate to make a finding of contempt against a Minister personally rather than against him in his official capacity provided that the contempt relates to his own default. Normally it will be

more appropriate to make the order against the office which a Minister holds where the order which has been breached has been made against that office since members of the department concerned will almost certainly be involved and investigation as to the part played by individuals is likely to be at least extremely difficult, if not impossible, unless privilege is waived (as commendably happened in this case). *In addition the object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt.* This can be achieved equally by a declaratory finding of the court as to the contempt against the Minister as representing the department. By making the finding against the Minister in his official capacity the Court will be indicating that it is the department for which the Minister is responsible which has been guilty of contempt. The Minister himself may or may not have been personally guilty of contempt. The position so far as he is personally concerned would be the equivalent of that which needs to exist for the Court to give relief against the Minister in proceedings for judicial review. There would need to be default by the department for which the Minister is responsible. (Emphasis added.)

Availability of contempt against ministers reinforces rule of law and provides coercive support for civil and judicial review remedies:

[59] It was long established in English law that the Crown cannot be held in contempt of court but the House of Lords *In re M* ruled that those acting on behalf of the Crown can now be. This in my view has further reinforced the rule established in the earlier landmark case of *Entick v Carrington* [1765] EWHC KB J98 that the State can only act lawfully in a manner prescribed by law, and is consistent with the British philosopher AV Dicey's formal conception of equality before the law. His treatise on *An Introduction to the Study of the Law of the Constitution* (1885) is generally considered to form at least a part of the unwritten British Constitution. In the Malaysian context this doctrine is of course well enshrined in art 8 of the Federal Constitution and in the Government Proceedings Act 1956 which deals with suits involving the Government. The GPA is modeled upon the UK's Crown Proceedings Act 1947. Specific to the issue of availability of contempt against Minister and government department acting in their official capability, it is instructive to note that in *In re M*, the Law Lords (having in the course of their judgment examined the relevant provisions of the Crown Proceedings Act 1947) held that even though the nature of contempt proceedings is personal and punitive, a finding of contempt against a Minister or government department would not merely be an academic exercise for the making of a finding (as opposed to punishment for contempt which may not be possible or appropriate) would vindicate the requirements of justice. The principles enunciated by Lord Woolf in *In re M* were also recently endorsed in a decision of the High Court of Hong Kong SAR in *Dr Q v The Health Committee of the Medical Council of Hong Kong* [2014] 2 HKLRD 57.

[60] This is a sensible proposition of common law since contempt jurisdiction would do much to complement the existing law which already permits civil proceedings and judicial review against decisions of Ministers and government departments within the framework of Government Proceedings Act 1956 and other related legislative prescriptions such as the Specific Relief Act 1950. It is also in consonance with the essence of the earlier mentioned observation of Arifin Zakaria FCJ (now Chief Justice of Malaysia) in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321.

[61] This is also consistent with the principle of promoting greater governmental accountability as decided in an earlier important decision of the Court of Appeal in *Sabil Mulia (M) Sdn Bhd v Director of Tengku Ampuan Rahimah Hospital* [2005] 3 MLJ 325; [2005] 2 AMR 502 which had ruled on the need to draw a distinction between civil proceedings and judicial review for purposes of ascertaining governmental liability, and that interim injunctions may be granted against the government or any servant of the government.

[62] There is therefore in my view no overriding rationale that can justifiably militates against the notion of making Ministers and government departments and officers subject to contempt proceedings. As stated, in the first place, O 73 r 12 excludes the application of O 45 to O 52 against only the federal government and state governments. It does not extend to insulate Ministers or servants of the Government. Nor is there any demonstrably compelling basis to hold otherwise. This proposition is well in accord with the principles enunciated in important precedents which have developed the law on ministerial and governmental accountability such as *Petrojasa*, *Sabil Mulia* and most manifestly for present purposes, *In re M*. Albeit only of persuasive authority, the common law position in *In re M* which establishes that a finding of contempt is capable under the law to be made against Ministers is neither divergent from nor in any way repugnant to the fundamental tenets underpinning the corpus of our domestic laws such that in my judgment, *In re M* also accurately represents the position under Malaysian law. Nor does the Government Proceedings Act 1956 or the Specific Relief Act 1950 expressly prohibit the institution of such contempt proceedings. As for the second and third proposed contemnors, I shall not attempt to do more than refer to the case of *Lembah Mayang Sdn Bhd & Others v Pengarah Jabatan Perhutanan & Anor* [2004] MLJU 201; [2004] 6 CLJ 465 where the Pengarah Jabatan Perhutanan was found guilty of contempt of court, and indeed punished with a fine of RM1,000 in default of one month's imprisonment. The argument that committal proceedings are not available against the second and third proposed contemnors is thus wholly misconceived. It is also worthy of emphasis that O 52 itself is not the source of the jurisdiction of the courts in committal proceedings. Further, O 52 r 9 expressly provides for the saving of other powers

of the court to order a person guilty of contempt to pay a fine or give security for good behaviour. In any event the House of Lords in *In re M* made it clear that there is a distinction between the finding of contempt and the punishment for contempt. It is of course axiomatic that in the instant case the application has not yet reached either stage for it is only presently being adjudicated at leave stage. Nevertheless, as I have found that committal proceedings can under the law be made against the proposed contemnors, the objection raised by the SLA on this point of law cannot therefore be sustained. I reiterate that O 73 r 12 does not insulate the proposed contemnors and in any event the law now permits committal orders be made against Government Ministers and departments.

Second ground – The proposed contemnors have no legal authority to alienate lands

Land alienation is within the purview of state authority

[63] The proposed contemnors also submitted that the purported obligations of the proposed contemnors to alienate and transfer the landed properties as required by the terms of the relevant consent orders as repeated in the mandamus order cannot be performed by them as the legal authority to do so is vested in the state authority, and not in any of the proposed contemnors. The proposed contemnors referred in particular to ss 76 and 5 of the National Land Code ('the NLC') which read as follows:

> 76 Meaning of alienation
>
> The alienation of State land under this Act shall consist of its disposal by the State Authority ...
>
> 5 Interpretation.
>
> State Authority means the Ruler or Governor of the State as the case may be ...

[64] I do not disagree with the authorities submitted by the proposed contemnors such as the Federal Court case of *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123 which affirmed what is already made sufficiently explicit in the NLC that the state authority is a different legal entity from the state government. However, I am not convinced based on the O 52 statement before me that this argument is a compelling one for me to accept at this leave stage of the committal proceedings.

Proposed contemnors estopped from submitting they have nothing to do with power of alienation:

[65] Firstly, the crux of the obligations of the proposed contemnors can be found in the first consent order dated 14 December 2009 (as repeated in the second consent order and the mandamus order) and are clearly described in prayers 1 to 3 of the same as stated in the earlier part of this judgment. Although prayers 1 and 2 contain the words 'The Defendants (ie the proposed contemnors) shall alienate and transfer to the Plaintiffs ...', prayer 3 does state 'The Plaintiffs may apply *to the state authority* ...'. This suggests that viewed in its entirety, the terms were deliberately drafted in the manner as agreed between the parties, and at least prayer 3 is not capable of being impugned by the contention of the proposed contemnors since the state authority is clearly envisaged, correctly, as being the lawful authority vested with the power to alienate lands.

[66] Secondly, the first and second consent orders, by definition are rightfully orders recorded by the court by consent of the parties and in this case were supposed to have represented the resolution of the dispute initiated by the civil suit. In this case, based on the O 52 statement and requisite affidavit in support, the settlement actually arose from the initiative of the proposed contemnors. As noted earlier, despite the first and second consent orders, this matter remained unresolved and subsequently witnessed further proceedings which culminated in the mandamus order. But the parties have remained the same throughout. The proposed contemnors do not in any event now say that the argument about the state authority being the lawful authority had ever been raised before in any of the earlier proceedings. The doctrine of estoppel may thus apply in the instant case against the proposed contemnors and in my view would not be objectionable because the issue of whether one is a correct party to the proceedings which first started about a decade ago does not involve the risk of preventing the exercise of a statutory duty, which would otherwise proscribe the application of estoppel (*Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58). As such, at this stage of leave application, and in the absence of a fuller ventilation of the issues with the benefit of affidavit evidence from the proposed contemnors, I am persuaded to form the view that the proposed contemnors would be estopped from asserting the said argument.

The Ruler, as the state authority acts on advice of EXCO, presided by Menteri Besar

[67] This is further related to my third point, which is that notwithstanding the position in law on the state authority being the lawful authority for land alienation purposes, it is just as clear that although s 5 of the NLC defines 'state authority' as the Ruler of the State, under cl 1(1) of the Eight Schedule to the

Federal Constitution, the Ruler must in any event act on the advice of the State Executive Council in carrying out his functions under the NLC. This is also consistent with the provisions of the Law of the Constitution of 1895 for the State of Johore. Article 7 of the Second Part of the State Constitution which provides as follows:

> Article 7
>
> (1) In the exercise of his functions under the Constitution or *any law* ... the Ruler shall act in accordance with the advice of the Executive Council or of a member thereof acting under the general authority of the Council ... (Emphasis added.)

Article 4 states that the Ruler shall appoint an Executive Council, to be presided by the Menteri Besar. Accordingly, in exercise of the function of the Ruler under the law, the Ruler shall act in accordance with the advice of the Executive Council and the reference to any law must clearly encompass the NLC. As stated by Raja Azlan Shah FJ (as his Highness then was) in *Public Prosecutor v Datuk Hj Harun bin Hj Idris (No 2)* [1977] 1 MLJ 15 at p 20:

> It is Executive Council who is the executive organ of the State Authority and exercise executive functions in the name of the Ruler.

[68] Thus it is not disputed that the Menteri Besar is not only not the state authority but is also not the Executive Council. But he is the Chairman of the Executive Council, and is for all intents and purposes effectively the chief executive of the state government. It is therefore not unreasonable to postulate that given the possible and not insignificant degree of influence the position of a Menteri Besar wields in matters concerning state administration, the proposed contemnors' non-objection to being named as parties from the time of the institution of the civil suit was precisely because they were in a position capable of ensuring or procuring the requisite alienation of the relevant lands to the applicant by the state authority, albeit at the same time taking on the risk of not ultimately being successful in securing the said alienation. But the pertinent point is this does not translate into the proposed contemnors being excused from performing their obligations under the mandamus order. In other words, I do not view prayers 1 and 2 of the first consent order to be especially legally objectionable or in any way conceptually flawed because they can be construed as sufficiently wide to admit of the obligations undertaken by the proposed contemnors to procure the contemplated and promised land alienation.

The second proposed contemnors answers to the state authority and represents the latter in all legal suits

[69] There is yet another premise on which the contention of the proposed contemnors can be questioned. It is this. It is simply not true that the proposed

contemnors have no legal authority to actually undertake land alienation according to the terms of the first consent order (as subsequently varied by other orders, and ultimately the mandamus order). At least not in respect of the second proposed contemnor. Although not a point raised by parties in the hearing before me, I am mindful of the relevant provisions of the NLC which stipulate that the State Director of Lands and Mines (the second proposed contemnor in these proceedings) is responsible to the state authority for the due administration of the provisions of the NLC within the relevant state, as follows:

12 State Director and other State Officers.

(1) The State Authority may appoint for the State –

(a) a State Director of Lands and Mines, a Registrar of Titles and a Director of Survey and Mapping;

...

(3) The State Director shall –

(a) be responsible to the State Authority for the due administration within the State of the provisions of this Act;

(b) act in accordance with any direction given to him by the State Authority;

(c) have all the powers conferred upon the Registrar and a Land Administrator by or under this Act;

(d) subject to the direction of the State Authority, exercise general control and supervision over the Registrar, and over all officers (other than Deputy Directors of Survey and Mapping and other Survey Officers) referred to in paragraph (b) of sub-section (1).

1 Delegation of powers of State Authority to State Director, etc.

The State Authority may by notification in the Gazette delegate to the State Director, or to the Registrar, or to any Land Administrator or other officer appointed under sub-section (1) of section 12, the exercise or performance (subject to such conditions and restrictions as may be prescribed in the notification) of any powers or duties conferred or imposed on the State Authority by or under this Act:

...

16 Actions by and against the State Authority.

(1) (1) The State Director may, on behalf of the State Authority, commence, prosecute and carry on in the name of his office any action, suit or other proceeding relating to –

(a) State land;

(b) any contract concerning land to which the State Authority is a party;

A (c) any trespass to, or other wrong committed in respect of land;

(d) the recovery of any item of land revenue, or any installment thereof; or

(e) the recovery of any fine, or the enforcement of any penalty, under this Act.

B

(2) Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office.

C (3) In any action, suit or other proceeding to which this section applies, the State Director may appear personally, or may be represented by any advocate and solicitor, any Federal Counsel, the State's Legal Adviser or any Land Administrator or other officer appointed under sub-section (1) of section 12.

D

[70] Thus, even though the second proposed contemnor is not the state authority, being the state director who is responsible to the latter, and who may even have the delegated authority to effect land alienation, the second proposed contemnor is certainly capable of representing the state authority in any E litigation. Section 16(2) of the NLC stipulates that actions against the state authority must be brought in the name of the second proposed contemnor. It cannot therefore be said that the state authority is not involved in the various proceedings in the instant case because for all intents and purposes it is an interested party who may well be directing the conduct of the second proposed F contemnor behind the scene (see *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699; [2000] 3 CLJ 666). Despite the relationship however, there does not appear to be any assertion in the submission of the SLA, for the proposed contemnors, that the proposed contemnors had taken active steps towards obtaining the approval of the state G authority. Based on the O 52 statement and the affidavit in support, it had always been silence and non-response from them when faced with and repeatedly reminded of the various deadlines for compliance. Accordingly in my view the SLA, for the proposed contemnors have not sufficiently provided a justification that could prevent the finding of a prima facie contempt against H the proposed contemnors.

Third ground – The applicants too failed to comply with the terms of the first consent order

I **[71]** The proposed contemnors submitted that the applicant had also failed to adhere to the terms of the first consent order which stipulated (in prayer 3) that the applicant 'may apply to the state authority within two (2) years from the date of this Order'. The affidavit in support of the O 52 statement confirmed that the requisite application for the 40 acres of land referred to in

prayer 3 was made on 23 December 2012 to Pentadbir Tanah Johor. This was beyond the two year time limit (which expired on 15 December 2011). Nor was the application submitted to the state authority, being the correct party specified in the first consent order. Additionally, the proposed contemnors contended that in the application submitted by the applicant, the latter themselves had identified the proposed 40 acres of land when the first consent order stated that the responsibility for the same fell on the proposed contemnors who were to assist the applicant in the application, which could any event only be approved by the state authority.

[72] I agree with the argument of the counsel for the applicant that this contention by the proposed contemnors should more appropriately be dealt with at the substantive committal stage (should leave be granted) because it involves factual disputes that ought rightfully be dealt with by the filing of affidavit in opposition by the proposed contemnors. The submission put forward by the SLA, other than those raising points of law, would otherwise tantamount to mere statements from the Bar, and thus cannot be admitted.

[73] In any event, if I were to venture into and confine such endeavour to the grounds stated in O 52 statement and the averments contained in the affidavit in support, the complaint raised by the proposed contemnors about the Applicant's application for the requisite land in relation to prayer 3 to be out of time appears to be factually erroneous. This is due to the fact that subsequent proceedings, which have been necessitated by the non-adherence to the first consent order, specifically the second consent order (referred to earlier in this judgment) categorically provided that the proposed contemnors must comply with their obligations under prayers 2 and 3 of the first consent order within a period of three months from 14 January 2013, thereby superseding the original deadline of 15 December 2011. The submission of the application by the applicant on 23 December 2012 was therefore well within the revised and agreed timeline. Further, the submission of the application to the land administrator instead of the state authority is not necessarily flawed since the land administrator could be said to be acting on behalf of the state authority pursuant to s 12(1) of the NLC I referred to earlier. I should also reiterate that the applicant did succeed in their judicial review application for a mandamus order which was not appealed against by the proposed contemnors, a fact that I cannot emphasise enough. As such, I find that this ground of objection too is untenable and without merit.

SUMMARY OF OVERALL EVALUATION

[74] I am satisfied that based on the O 52 statement and the verifying affidavit, the applicant have successfully established a prima facie case of contempt of court against the proposed contemnors for the latters' failure to comply with the terms of mandamus order, justifying leave be granted to the applicant to make an application to the court for an order of committal against the proposed contemnors. The contents of the verifying affidavit cannot by any stretch of imagination be construed an being inherently improbable, especially given that the non-adherence appeared to have set in since the first consent order and persisted for a continued period of about five years, disobeying the certificate of judgment and the second consent order in the process and the mandamus order as presently. I have no reasons to believe that the proposed contemnors have no knowledge of the terms of the mandamus order, and although not strictly mandatory for issues concerning procedural safeguards other than the O 52 statements to be determined at the leave stage, I have nevertheless considered them but agreed that on the basis of prima facie test, and particularly given knowledge of the proposed contemnors of their obligations, there are case law authorities which support the contention of the applicant in relation to the absence of penal notice and personal service, among others. More importantly, the proposed contemnors, who were represented by their counsel, namely the SLA who appeared to oppose the leave application did not raise any of the procedural issues and instead submitted on matters which either pertain to the merits of the case (which even on the basis of the O 52 statement and affidavit in support, could be refuted) or on the point of law. The most significant of the latter is the position in law concerning the availability of the order of committal against ministers of federal and state governments. I have made the finding that O 73 r 12 of the RC 2012 exempts only the federal government and the state governments, and its ambit does not extend to immunise ministers of the federal and state governments (including Menteri Besar of the latter) from contempt proceedings. More substantively, the rule that established that proposition of law in the leading constitutional decision of the House of Lords in *In re M* is one that similarly represents the law on this point in this country.

CONCLUSION

[75] In conclusion, in view of the foregoing reasons, it is my finding that the applicant have successfully established a prima facie case of contempt against the proposed contemnors on account of the non-compliance by the latter with the terms of the mandamus order. Accordingly, leave under O 52 r 3 is hereby granted to the applicant to initiate an application to the court for the relevant order of committal.

Order accordingly.

Reported by Afiq Mohamad Noor